**DEPARTMENT OF STATE REVENUE**
**LETTER OF FINDINGS: 02-0609**
**Indiana Sales and Use Tax**
**For the Years 1999 and 2000**

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## ISSUES

**I. Miscellaneous Purchases of Tangible Personal Property** – Use Tax.

**Authority**: IC 6-2.5-3-5(a); IC 6-8.1-5-1(b).

Taxpayer maintains that it is not responsible for paying use tax on certain items of tangible personal property because taxpayer paid sales tax to another state at the time the items were first purchased or because taxpayer has already self-assessed use tax on these items.

**II. Riverboat Purchase** – Use Tax.

**Authority**: IC 6-2.5-1-1 et seq.; IC 6-2.5-3-2; IC 6-2.5-3-2(a); Gregory v. Helvering 293 U.S. 465 (1935); Ind. Dep't of State Revenue v. Trump Indiana, Inc., 814 N.E.2d 1017 (Ind. 2004); Grand Victoria Casino & Resort v. Dept. of State Revenue, 789 N.E.2d 1041 (Ind. Tax Ct. 2003); Bethlehem Steel Corp. v. Ind. Dept. of State Revenue, 597 N.E.2d 1327 (Ind. Tax Ct. 1992).

Taxpayer argues that it is not subject to use tax on the cost of buying a riverboat because the boat was built in a state which provides a sales/use tax exemption and because the boat was received as a consideration-free capital contribution.

**III. Computation Error**.

**Authority**: IC 6-8.1-5-1(b).

Taxpayer maintains that it is entitled to an abatement of a use tax assessment because the audit misinterpreted an entry on its record of invoices.

**IV. Ten-Percent Negligence Penalty**.

**Authority**: IC 6-8.1-10-2.1; IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer maintains that it is entitled to an abatement of the ten-percent negligence penalty because it did not intend to deliberately avoid the payment of taxes and because it did not act from negligence or an intentional disregard of the law.

## STATEMENT OF FACTS

Taxpayer operates an Indiana riverboat along with an associated hotel, parking garage, golf course, pavilion, restaurants, and gift shop. During 2001, the Indiana Department of Revenue (Department) conducted an audit review of taxpayer's business and tax records. The audit review determined that taxpayer owed additional use tax. In November 2002, the Department issued a notice of "Proposed Assessment" to that effect. Taxpayer disagreed with the assessment and on December 2, 2002, submitted a protest. Following various delays and a change in taxpayer's representation, an administrative hearing was held during which taxpayer's representatives explained the basis for taxpayer's protest. This Letter of Findings results.

## DISCUSSION

### I. Miscellaneous Purchases of Tangible Personal Property – Use Tax.

Taxpayer maintains that the audit erroneously imposed use tax on certain tangible personal property for which taxpayer had paid sales tax to other states or for which it has already self-assessed use tax.

Taxpayer believes that it is entitled to an offsetting credit for amounts of use tax it paid to other states. IC 6-2.5-3-5(a) states that, "A person is entitled to a credit against the use tax imposed on the use storage or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property."

Taxpayer has responsibility for demonstrating the proposed assessment is incorrect. IC 6-8.1-5-1(b) provides that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer indicates that it has provided invoices from out-of-state vendors each of which supports taxpayer's contention that it was billed for and paid sales tax on the items purchased from those out-of-state vendors.

The administrative hearing is not the venue for examining taxpayer's invoices and determining to what extent it is entitled to the specific relief requested. However, taxpayer has met its burden of demonstrating that the invoices – to the extent that those invoices were included in the material provided before or at the time of the hearing – should be reviewed by the audit division. Accordingly, the audit division is requested to review taxpayer's invoices and to make whatever adjustments the audit division deems warranted.

## FINDING

Subject to review by the audit division, taxpayer's protest is sustained.

**II.** **Riverboat Purchase** – Use Tax.

Taxpayer's parent company entered into a contract with an Alabama shipyard for the construction of a riverboat. Parent company eventually accepted title to and delivery of the riverboat while the riverboat was located in Alabama. Parent company paid Alabama shipyard a substantial amount of money for the riverboat. Parent company's board of directors arranged to transfer the riverboat to taxpayer as a "capital contribution, for no consideration." The riverboat was piloted into international waters at which time financial responsibility and ownership interest was formally transferred from parent company to taxpayer. Thereafter – with ownership interest firmly vested in taxpayer – the riverboat was sailed up the Mississippi River to the final Indiana docking point.

Based upon taxpayer's description of the events noted above, taxpayer maintains that it does not owe use tax on the cost of the riverboat because it did not pay anything for the riverboat.

Indiana imposes a sales tax on retail transactions and a complimentary use tax on tangible personal property that is stored, used, or consumed in the state. IC 6-2.5-1-1 et seq. The use tax "is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2.

Taxpayer states that it is not subject to use tax because the riverboat was received in the form of a "capital contribution" from its parent company. If taxpayer's argument is understood correctly, parent company purchased the riverboat and then "contributed" the riverboat to taxpayer. According to taxpayer, because it did not obtain the riverboat in a "retail transaction," taxpayer has no use tax liability.

In Ind. Dep't of State Revenue v. Trump Indiana, Inc., 814 N.E.2d 1017 (Ind. 2004), the Indiana Supreme Court determined that a riverboat was tangible personal property the acquisition of which was subject to use tax. Taxpayer argues that its parent company acquired the riverboat from the shipyard, that the riverboat was transferred to taxpayer in the form of a "capital contribution," and that the intervening transaction immunized taxpayer from paying use tax. Taxpayer points to the Tax Court's decision in Grand Victoria Casino & Resort v. Dept. of State Revenue, 789 N.E.2d 1041 (Ind. Tax Ct. 2003) for support of its position that tangible personal property received in the form of a capital contribution is not subject to use tax. In that case, petitioner Grand Victoria was a company that was formed as the result of the merger of two predecessor companies. Id. at 1043. When the two predecessor companies merged, they made a capital contribution – consisting of a riverboat – to Grand Victoria, the successor company. Id. The Tax Court agreed with petitioner's position that the transfer of the riverboat was not subject to sales tax, "because the capital contribution was a transfer of property without consideration . . . [and] does not constitute selling at retail and therefore is not subject to sales tax." Id at 1046. In addition, the court went on to reject the Department's alternative argument – that the petitioner's riverboat was subject to use tax – because "a licensed riverboat is real property." Id. at 1048 n.9.

The Department is unwilling to agree that the Tax Court's decision in Grand Victoria is dispositive of the issue here in question. As noted above, the Indiana Supreme Court has determined that – for sales and use tax purposes – a "casino riverboat, like any other boat, is 'tangible personal property.'" Trump Indiana, 814 N.E.2d at 1021.

The issue is whether taxpayer's particular acquisition of its own riverboat is subject to the state's use tax. IC 6-2.5-3-2(a) states that, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." Plainly, the casino riverboat is "tangible personal property." Plainly, the riverboat was acquired in a "retail transaction" because parent company paid the Alabama shipyard millions of dollars in exchange for the vessel. Plainly parent company did not pay Alabama sales tax at the time it paid for the completed riverboat because Ala. Stat. § 40-23-4(12) exempts such vessels from Alabama tax. Nevertheless, taxpayer relies on the proposition that parent company's transitory ownership and intervening transfer of the riverboat to taxpayer insulates taxpayer from use tax liability.

The Department is unable to agree that taxpayer's argument is supported by either law or common sense. The fact that parent company bought the riverboat on behalf of taxpayer and that parent company officially transferred ownership of the vehicle during the vessel's brief sojourn in the Gulf of Mexico is little more than an empty formality devoid of either practical or legal substance. As noted in Bethlehem Steel Corp. v. Ind. Dept. of State Revenue, 597 N.E.2d 1327 (Ind. Tax Ct. 1992), "In Indiana, tax consequences generally are determined by the substance rather than the form of a transaction." Id. at 1331. (A corporate business activity undertaken merely for the purpose of avoiding taxes is without substance and "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Gregory v. Helvering 293 U.S. 465 (1935)).

IC 6-2.5-3-2 has a "serious purpose," and use tax liability – whether for a lawn mower, a refrigerator, or riverboat – is not lightly circumvented. The riverboat was acquired in a retail transaction and was transferred to Indiana. Taxpayer now enjoys the "use" and benefit of that riverboat. The riverboat is subject to Indiana use tax.

**FINDING**

Taxpayer's protest is respectfully denied.

**III. Computation Error**.

Taxpayer states that the Department erred in assessing use tax on particular tangible personal property. Specifically, taxpayer claims the audit misread a 2000 journal entry as indicating the tangible personal property cost $234,000 when, in fact, the item cost $23,400. To that end, taxpayer has supplied a copy of an invoice indicating the purchase price of the item was $23,400. As set out in Part I above, "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1(b). Taxpayer has met its burden of demonstrating that the audit division should revisit this particular issue and make whatever adjustment the audit division deems warranted.

**FINDING**

Subject to review by the audit division, taxpayer's protest is sustained.

## IV. Ten-Percent Negligence Penalty.

Taxpayer maintains that it has established reasonable cause for failing to pay use tax on the items protested, that it did not willfully neglect its duty to pay use tax, and that it relied on established law in determining that it did not owe use tax on the items assessed. Therefore, taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty.

IC 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence.

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ."

As noted above in parts I and II, taxpayer is entitled to a correction of the use tax assessment to the extent that it has supplied additional information or the extent that the audit may have made an error in its computation. It follows then, that the ten-percent negligence penalty attached to those particular amounts will resolve itself because any correction in the assessment will lead to a correction in the amount of penalty. Nonetheless, the bulk of the assessment stems from taxpayer's failure to self-assess use tax at the time it – or its parent company – acquired the riverboat. Although, taxpayer's argument is not totally fanciful, the Department is unable to agree that taxpayer exercised "ordinary business care and prudence . . . " when taxpayer concluded – without seeking guidance from the Department in the form of a formal or informal ruling – that it could wholly avoid use tax liability by gaining control of a multi-million dollar riverboat as a "capital contribution" and thereafter make "use" of that riverboat within Indiana.

## FINDING

Taxpayer's protest is respectfully denied.

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